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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SERGIO GARCIA DELACRUZ et al., Defendants and Appellants.	H036122 (Monterey County Super. Ct. No. SS081823)

A jury convicted defendants Sergio Garcia Delacruz and Marisela Andrade of first degree murder and kidnapping. It also found true special-circumstance allegations for purposes of life-without-parole sentences (murder while engaged in a kidnapping) and a firearm-use-causing-death allegation as to Delacruz for purposes of a consecutive 25-year-to-life sentence enhancement. The trial court sentenced defendants to life without parole for the murder convictions, stayed eight-year concurrent sentences for the kidnapping convictions, stayed Delacruz's 25-year enhancement, and imposed $10,000 restitution fines (Pen. Code, § 1202.4)[1] and corresponding, suspended parole-revocation fines (§ 1202.45). On appeal: Delacruz contends that (1) the trial court erred by overruling his objection to the admission of his confession that was grounded on an involuntary waiver of his *Miranda*[2] rights, and (2) the suspended parole-revocation fine is

[1] Further unspecified statutory references are to the Penal Code.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

improper because his sentence does not allow for parole; Andrade contends that the trial court erred by (1) inadequately instructing the jury on the natural and probable consequences doctrine, (2) failing to instruct the jury sua sponte on the lesser included offense of manslaughter, and (3) inadequately instructing the jury on second degree murder. As a fallback position, she claims that she received ineffective assistance of counsel because her trial counsel failed to request an adequate instruction on the natural and probable consequences doctrine. We affirm the judgments.

BACKGROUND

Defendants were lovers. Their cell phone text messages outline a plot to kidnap and kill Andrade's husband, Jose Zarate. The plot came to fruition one morning when Andrade drugged Zarate. Andrade then took her children to school while leaving the front door open. Delacruz arrived at the home with an accomplice, hit Zarate, tied him up, wrapped him in a blanket, and put him in the trunk of Zarate's car. He took Zarate's gun from the home and drove his car to a remote vineyard. He opened the trunk and shot Zarate in the forehead. Both defendants separately confessed to Detective Alfred Martinez when confronted with their text messages.

The People's theories were that Delacruz was guilty of first degree murder and kidnapping as the perpetrator and Andrade was guilty of first degree murder and kidnapping as an accomplice.

Delacruz urged that he was guilty of no more than second degree murder because his confession could be construed to negate express malice. He argued to the jury that he "sort of pointed the gun inside and closed the trunk, almost as if, you know, one of these things when you turn your head and fire the shot."

Andrade urged that she was not an accomplice to murder because the confessions could be construed to negate her intent to kill. She argued to the jury that she did not intend that Delacruz kill Zarate and that Delacruz's decision to kill was spontaneous: "[S]he said [in her statement to Detective Martinez] 'I did not intend to.' . . . [A]ccording

to the statement given by Mr. Delacruz, even he said that that was not the intent to kill. He was supposed to beat up this individual. Something happened at the last moment, and for whatever reason, whether it was he freaked out because the guy looked at him." She concluded: "You'll see that there is no aiding and abetting. There is none of this. So she's not guilty of murder. She's guilty of a number of things, of [an illicit] love affair. She's guilty of planning to beat him up and maybe even taking him out of the house. Maybe there's a kidnapping there. . . . But there is no intent to kill, and there's no intent to kidnap for the purposes of killing."

WAIVER OF *MIRANDA* RIGHTS (DELACRUZ)

Police placed Delacruz in an interview room at 2:43 a.m. and handcuffed him. Detective Martinez entered the room at 5:40 p.m. and unlocked the handcuffs. He told Delacruz that he was investigating a case and wanted to see what Delacruz could tell him. The two talked about Delacruz having a health problem with his kidneys. Detective Martinez then asked Delacruz personal and family background questions. He thereafter informed Delacruz that he had two rules for his interviews: one, that "we're talking as men. We're adults and I respect you, you respect me . . . and that respect comes from telling the truth. . . . We don't li--, we don't lie. If it's, if it's something that . . . I tell everyone that I talk to, if, if there's something they don't want to say, or . . . it's better to say, 'I don't want to say' . . . than to try and make something up, or . . . I mean, or just make up a story. It's . . . if we're men, we're talking here as men and men only tell the, only the truth"; and two, that "when here in this room . . . my special room, uh, only truth comes out of here. . . . And there's no reason to, to say anything else other than the truth. . . . Because I'm telling you, my job, uh . . . my job is, is to talk to people and understand what they've gone through, what they're going through, and document that information in a report. . . . I'm not here as a judge . . . I'm not here to judge anyone . . . and, and I say that because I'm not a perfect person. . . . Uh, and I like to tell people that I'm not a perfect person so that they know that I'm not, I'm not sitting here, feeling superior . . . or

that I'm better than the other person because I'm not, I know I'm not. OK?" Detective Martinez continued that he made mistakes when he was young and could therefore see that most of the people he talked to were good people regardless of what crime was involved. He added that people found themselves in situations because of forces that influenced them and mistakes. He posed that "the good thing about mistakes is that we have the opportunity to repent of the things that we do." He said that his job was to write down what people told him because lawyers and judges do not have the opportunity to talk and learn that the person in court is "really not a very bad person." He offered that "the circumstances they found themselves in, out of necessity, uh, sometimes we're blinded by things, in what we're doing . . . and we don't think about things, there are other things that influence us, other people who influence us, and sometimes we don't have control over that." He added "That's why I do everything possible to, in my reports, to put everything in that people can tell me . . . uh, about their circumstances and why they are, they found themselves in the position that they were in . . . in my report. . . . And that way, the ones who read those reports later, uh, they can uh, have a, a better uh, understanding of that person, of the personality . . . and it's not just someone who is being accused of something." He repeated that "we all make mistakes in one way or another" and related that he gets upset if he finds out that one of his children made a mistake without the child telling him first but, if before he finds out, the child admits to a mistake "the punishment that you receive as a kid like that, it's always less." He continued that "And I'm telling you this because people, like I told you, people in, in the justice system . . . the judges, the lawyers who read those reports, they're also human. . . . And if I can't help them understand . . . the feelings, the reasons for someone who found himself in that position . . . they can only see what's in black and white. . . . That's the crime, that was what happened. But if they can see, that's the crime, but this person . . . feels, feels regret, thinking about it now, says, 'Mmm, I made a mistake, I was influenced by something, I was blinded by one thing or another,' then they also, being human . . .

react differently." He offered "That's why I say, the truth is always better. . . . The truth makes us free. . . . Ok? If we don't tell the truth, we're captives. . . . It's as if we formed a chain. . . . Every lie that we tell, everything that . . . uh, mistake, and those are all mistakes . . . that we all make, but we form our chain. Ok? . . . The truth will help us to get out of that chain and, and shake that chain off. . . . It unties it. Uh, the same way, another example would be not . . . and you have, you have dug holes before, right? . . . You have made holes in the ground. . . . If you start making a hole in the ground and you're not careful about mak--, you're not . . . you make it so deep . . . you get to a point when it's so deep, and you haven't paid attention . . . there's no way to get out. . . . That's what we do when we try to not tell the truth. . . . We dig that hole . . . that hole gets really deep, we can't get out. . . . And there's no wa--, and if . . . the only way that we can . . . we can help ourselves get out is that someone else . . . gives us a hand, gives us a, a rope, gives us a ladder, and that comes through cooperation. . . . Ok? Cooperation comes through people telling the truth. . . . Instead of lying. Uh, that's why I'm telling you, it's very important. . . . Very important because the case that we're going to talk about here is a very important case. . . . Uh, but I have to have understanding. Uh, the case that I'm investigating . . . uh, I'm investigating the death of a, of a man. . . . Ok? And through my investigation . . . I've talked to people in this case . . . this man's wife . . . and with other family members. . . . And through these people I have found out that they weren't so faithful. . . . Ok? And you[r] name has come up . . . about that, as having a relationship . . . with those people. The case, when . . . any time that I have a case, uh, it's like I suspect the whole world. . . . Because without knowing, without knowing . . . I suspect the whole world. . . . What we do as investigators is try to look for all the ways, all, all the possible connections there are . . . because sometimes, through talking to people, we can get a small clue or . . . here and there. . . . It's as if we were doing a puzzle on this, on this table. . . . And they're . . . we know that puzzles have small pieces . . . and if we're missing a piece . . . the picture never looks good. . . . That's why we talk

to every possible person. . . . Through my interviews I have found out that, that, uh, uh . . . well, that you know a lady named Marisela. . . . She happens to be the wife of the man . . . that, that . . . someone killed. . . . And I knew, I have noticed that she wasn't, she wasn't faithful. . . . He wasn't either, but she wasn't faithful to, to her husband. . . . And I have to see the different possibilities. . . . Ok? That's why I wanted to talk to you today." Detective Martinez then advised Delacruz of his *Miranda* rights, Delacruz waived his rights and agreed to speak with Detective Martinez, and Delacruz implicated himself in the murder.

In overruling Delacruz's objection to the admission in evidence of the interview with Detective Martinez, the trial court explained as follows: "I read very carefully from Page 1 through 47 because that is when the pre-Miranda discussion occurred, as well as the actual advisement of rights, which started on about Page 44 and went through 47 before they were concluded. [¶] In addition, I read--and then thereafter, I was reading parts of the interviews to get some context on the post-Miranda part of the interview, as well as the pre-Miranda. [¶] I have also read People versus Honeycutt, 20 Cal. 3d, 150, a California Supreme Court case. I do believe the cases are different in their factual settings and circumstances. [¶] And the questions and responses from Pages 1 through 43 would be estimated to be over a period of 20 minutes approximately. [¶] They tell where the defendant was born, his cell phone, phone contact, emergency information, his work, his family, and the defendant started talking about an accident having been injured on the job at one point in time. [¶] There is also a conversation from the detective about what he is looking for as the truth, not judging people and commenting about having people make mistakes and better to be open and truthful about it before he gets into the Miranda Rights. [¶] However, I still view the interview and the waiver of the Miranda Rights were involuntary [*sic*] submitted notwithstanding the pre-Miranda discussion going on. [¶] There were no questions that would be eliciting a confession that I saw in any pre-Miranda interview. [¶] So I do find that the Miranda Rights were voluntar[ily] and

intelligently waived by the defendant during the course of this interview. That objection is overruled."

Delacruz relies on *People v. Honeycutt* (1977) 20 Cal.3d 150 (*Honeycutt*), and reiterates his challenge to the admission of the interview. He argues that his waiver of his *Miranda* rights was involuntary because the waiver resulted from a softening-up through disparagement of the victim and ingratiating conversation. He offers that Detective "Martinez engaged [him] in a lengthy conversation prior to giving the *Miranda* advisements," which "covered a wide range of topics" such as his kidney pain, occupation, and family. He continues that Detective Martinez then "exhorted [him] to tell the truth" and suggested that he "would be treated more leniently if he told the truth." He additionally asserts that Detective Martinez denigrated the victim by "telling [him] he had learned the man who was killed had been unfaithful." He further urges that he spent 15 hours handcuffed in the interview room before Detective Martinez advised him of his *Miranda* rights. According to defendant, "The combination of an extended period of incommunicado incarceration while in handcuffs, disparagement of the victim, softening-up of the suspect by ingratiating conversation and the suggestion of more lenient treatment if he 'told the truth' combined to render his waiver of rights involuntary." We disagree with Delacruz.

Any waiver of *Miranda* rights must be voluntary, knowing, and intelligent. (*Miranda*, *supra*, 384 U.S. at p. 444.) "[T]he waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals . . . the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) The state must demonstrate the validity of the waiver by a preponderance of the evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1034.)

" 'When reviewing a trial court's decision on a motion that a statement was collected in violation of the defendant's rights under *Miranda*, [citation], we defer to the trial court's resolution of disputed facts including the credibility of witnesses, if that resolution is supported by substantial evidence. [Citation.] Considering those facts, as found, together with the undisputed facts, we independently determine whether the challenged statement was obtained in violation of *Miranda*'s rules.' " (*People v. Gurule* (2002) 28 Cal.4th 557, 601.)

Contrary to defendant's argument, *Honeycutt* does not compel exclusion of his interview. The defendant in *Honeycutt* was arrested and placed in a patrol car without *Miranda* admonitions. The defendant refused to talk until he realized he was acquainted with the detective transporting him to the station. At the station, the defendant was hostile to a second detective, who left the room, and the first detective then engaged the defendant in a half-hour unrecorded conversation about past events, former acquaintances, and the victim. The detective "mentioned that the victim had been a suspect in a homicide case and was thought to have homosexual tendencies." (*Honeycutt*, *supra*, 20 Cal.3d at p. 158.) At the end of the half-hour, the defendant "indicated he would talk about the homicide." (*Ibid*.) He then was read his rights, waived them, and confessed. Based on these facts, the court concluded that "[w]hen the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive without a *Miranda* warning must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary." (*Id*. at pp. 160-161.)

Honeycutt does not stand for the general proposition that every prewarning conversation vitiates a subsequent knowing and voluntary waiver. (See *People v. Patterson* (1979) 88 Cal.App.3d 742, 751.) Rather, "*Honeycutt* involves a unique factual

situation and hence its holding must be read in the particular factual context in which it arose." (*Ibid*.)

In this case, there was no "evidence suggesting that the manner in which [Detective Martinez] engaged in small talk overbore [Delacruz's] free will." (*People v. Gurule*, *supra*, 28 Cal.4th at p. 602 [distinguishing *Honeycutt*].)

In addition, Delacruz was not initially reluctant to talk as was the defendant in *Honeycutt*; he was not acquainted with the interrogating officer as was the defendant in *Honeycutt*; he was not hostile to the interrogating officer as was the defendant in *Honeycutt*; and he did not agree to talk about the criminal investigation before he had been advised of his *Miranda* rights as did the defendant in *Honeycutt*.

Moreover, the defendant in *Honeycutt* was subject to two interrogation ploys to elicit the waiver: (1) the "Mutt and Jeff routine where one officer acts aggressively and hostile while a second officer, when alone with the suspect, seeks to gain his confidence by disapproving his partner's behavior"; and (2) "disparagement of the victim to induce in the defendant a feeling that his acts were justified." (*Honeycutt*, *supra*, 20 Cal.3d at p. 160, fn. 5.) Here, however, there was no Mutt and Jeff routine and Detective Martinez's brief, general statement regarding the Zarate's marital fidelity cannot be reasonably construed as suggesting that Zarate's killing was justified.

Honeycutt is therefore distinguishable.

We also observe that there is no evidence in the record to support defendant's proposition that the lengthy time Delacruz spent handcuffed in the interview room before the interview overbore his free will. (Cf. *People v. Gurule*, *supra*, 28 Cal.4th at p. 602.) The transcript from which we have recounted Detective Martinez's pre-*Miranda* remarks to Delacruz indicates that Delacruz was attentive, responsive, and engaging to those remarks.

And finally, inducements to speak the truth are not always, or necessarily, coercive. "The line to be drawn between permissible police conduct and conduct deemed

to induce or to tend to induce an involuntary statement does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police. Thus, 'advice or exhortation by a police officer to an accused to "tell the truth" or that "it would be better to tell the truth" unaccompanied by either a threat or a promise, does not render a subsequent confession involuntary.' [Citation.] . . . [¶] When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand, if in addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear." (*People v. Hill* (1967) 66 Cal.2d 536, 549.) Here, Detective Martinez did not offer defendant any tangible benefit for speaking the truth. He implied no offer of lenient treatment by the police, prosecution, or court. At best, the exhortations to tell the truth are ambiguous. But the trial court was not required to make the inference that the exhortations implied the existence of a police promise of lenient treatment.

We agree with the trial court that Delacruz's waiver of his *Miranda* rights was knowing and voluntary. The subsequent interview was therefore admissible.

PAROLE REVOCATION FINE (DELACRUZ)

Section 1202.45 provides: "In every case where a person is convicted of a crime *and whose sentence includes a period of parole*, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine . . .

shall be suspended unless the person's parole is revoked. Parole revocation restitution fine moneys shall be deposited in the Restitution Fund in the State Treasury." (Italics added.)

" 'When there is no parole eligibility, the [parole eligibility] fine is clearly not applicable.' " (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1184, citing *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1183; *People v. Jenkins* (2006) 140 Cal.App.4th 805, 819.) But, the above cases involved no determinate terms. Our Supreme Court has said, in a case involving a death sentence, as well as several determinate terms: "[Former] [s]ection 3000, subdivision (a)(1) provides that [a determinate term imposed under section 1170] 'shall include a period of parole.' Section 1202.45, in turn, requires assessment of a parole revocation restitution fine '[i]n every case where a person is convicted of a crime and whose sentence includes a period of parole.' The fine was therefore required . . . . [¶] . . . [D]efendant here is unlikely ever to serve any part of the parole period on his determinate sentence. Nonetheless, such a period was included in his determinate sentence by law and carried with it, also by law, a suspended parole revocation restitution fine. Defendant is in no way prejudiced by assessment of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked." (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.)

Because Delacruz was also sentenced to a determinate prison term for the kidnapping, the parole revocation fine was properly assessed.

INSTRUCTIONAL ERRORS (ANDRADE)

"Under California law, a person who aids and abets the commission of a crime is a 'principal' in the crime, and thus shares the guilt of the actual perpetrator. [Citation.] [¶] Accomplice liability is 'derivative,' that is, it results from an act by the perpetrator to which the accomplice contributed." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*).) Therefore, "a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts." (*People v. McCoy*

(2001) 25 Cal.4th 1111, 1117.) A defendant can be liable as an aider and abettor in two ways. First, an aider and abettor with the necessary mental state is guilty of the intended crime (target crime). Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the target crime, but also for any other offense (nontarget crime) that was a natural and probable consequence of the crime aided and abetted. (*Ibid.*)

"To convict a defendant of a nontarget crime as an accomplice under the 'natural and probable consequences' doctrine, the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a 'natural and probable consequence' of the target crime that the defendant assisted or encouraged." (*Prettyman, supra,* 14 Cal.4th at p. 254.)

"[W]hen the prosecutor relies on the 'natural and probable consequences' doctrine, the trial court must identify and describe the target crimes that the defendant might have assisted or encouraged. An instruction *identifying* target crimes will assist the jury in determining whether the crime charged was a natural and probable consequence of some other criminal act. And an instruction *describing* the target crimes will eliminate the risk that the jury will engage in uninformed speculation with regard to what types of conduct are criminal." (*Prettyman, supra,* 14 Cal.4th at p. 254.)

A trial court's sua sponte duty to instruct under the natural and probable consequences doctrine extends only to target offenses specifically requested by a prosecutor. "[T]he sua sponte duty to instruct that is imposed here is quite limited. It arises only when the prosecution has elected to *rely* on the 'natural and probable consequences' theory of accomplice liability and the trial court has determined that the

evidence will support instructions on that theory." (*Prettyman, supra,* 14 Cal.4th at p. 269.)

Here, the People did not rely upon the natural and probable consequences doctrine. During discussion of the jury instructions, the prosecutor specifically disaffirmed its reliance on the natural and probable consequences doctrine and withdrew any extant request for CALCRIM No. 402, the instruction applicable to the natural and probable consequences doctrine that provides for the identification of target and nontarget crimes.

Andrade nevertheless contends that the trial court erred by failing to instruct the jury sua sponte on her theory of the target crime (assault) and lesser included offenses of the charged crime of murder (voluntary and involuntary manslaughter). She reasons that the jury could have convicted her of manslaughter by concluding that she aided and abetted an assault, which resulted in Zarate's death, but that murder was not a natural and probable consequence of the assault. In a dependent argument, she contends that the trial court's general instructions on the lesser included offense of second degree (nonpremeditated) murder were deficient because, without identifying assault as the target crime, the jury had no basis to evaluate whether nonpremeditated murder rather than premeditated murder was a natural and probable consequence of the assault. She urges that the trial court instructed on the natural and probable consequences doctrine notwithstanding the People's election against relying on the doctrine.

It is true that, before instructing in the language of CALCRIM No. 401, the instruction on aiding and abetting the crime committed by the perpetrator, the trial court instructed the jury in the language of CALCRIM No. 400, the introductory instruction on aiding and abetting, as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator who directly committed the crime. A person is guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it. [¶] *Under some specific circumstances, if*

the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."[3]

Inherent in Andrade's contention is the proposition that the above-italicized language of CALCRIM No. 400 instructs on the natural and probable consequences doctrine but fails to identify the target crime. *Prettyman* involved a similar situation.

In *Prettyman*, the prosecutor did not rely on the natural and probable consequences doctrine, request instructions on the doctrine, or argue the doctrine to the jury. The trial court nevertheless instructed the jury as follows: " 'One who aids and abets is not only guilty of the particular crime aided and abetted, but is also liable for the *natural and probable consequences* of the commission of such crime. You must determine whether the defendant is guilty of the crime originally contemplated, and, if so, whether any other crime charged was a natural and probable consequence of such *originally contemplated* crime.' " (*Prettyman*, *supra*, 14 Cal.4th at pp. 257-258.)

After holding that the trial court had no sua sponte duty to instruct on the natural and probable consequences doctrine given the prosecutor's nonreliance on the doctrine, the court nevertheless observed as follows: "But once the trial court, without a request therefor, chose to instruct the jury on the 'natural and probable consequences' rule, it had a duty to issue instructions identifying and describing each potential target offense supported by the evidence. By failing to do so, the trial court erred." (*Prettyman, supra*, 14 Cal.4th at p. 270.)

For purposes of analysis, we assume that the trial court in this case similarly erred.

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[3] The italicized language is bracketed in CALCRIM No. 400. The Bench Note to CALCRIM No. 400 states that the trial court should instruct with the italicized language if the prosecution is relying on the natural and probable consequences doctrine. Given that the People disclaimed relying on the natural and probable consequences doctrine and Andrade neither requested nor was entitled to an instruction on the doctrine, it appears that the trial court gave the italicized part of CALCRIM No. 400 by mistake.

After finding error, the *Prettyman* court analyzed whether the error and dependent error (failing to instruct on the lesser included offense of involuntary manslaughter) were prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) It first reasoned that the controlling error was harmless: "[T]he prosecution proceeded on the theory that [the accomplice] encouraged or assisted [the perpetrator] to murder [the victim] and was guilty of murder as an accomplice to that crime. This theory was amply supported by the evidence, and it is not reasonably probable that the trial's outcome would have been different in the absence of the trial court's instructional error." (*Prettyman*, *supra*, 14 Cal.4th at p. 274.) And it second reasoned that the dependent error was harmless: "The trial court instructed the jury on the crime of second degree murder, a lesser offense included within the crime of first degree murder. The jury, by convicting [the accomplice] of first degree murder rather than second degree murder, necessarily rejected the possibility that the only natural and probable consequence of the crime she aided and abetted was involuntary manslaughter, a less serious crime. Because 'the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions' [citation], [the accomplice] suffered no prejudice from any possible error in failing to instruct on involuntary manslaughter." (*Id.* at p. 276.)

Andrade accepts that the traditional harmless error test set forth in *Watson* is the appropriate test to measure whether the supposed instructional error in this case is reversible. But she disagrees with *Prettyman*'s application of the test. She urges that the instructional error removed from the jury's consideration a closely-contested, pivotal factual issue: whether she "intended to aid an assault and, as a consequence, whether manslaughter [or second degree murder were] foreseeable." She poses that her conviction for first degree murder rather than second degree murder adds nothing to the prejudice analysis because the jury was never told how to arrive at a lesser offense under her assault theory. She claims that the instructional error gave the jury an improper all-

or-nothing option to convict of murder or acquit when the jury, if it accepted her assault defense, was unlikely to acquit in light of her undisputed involvement.

The question, however, is whether it is "reasonably probable that the trial's outcome would have been different in the absence of the trial court's instructional error." (*Prettyman*, *supra*, 14 Cal.4th at p. 274.) The answer to this question follows from the answer to the following question: is it reasonably probable that the jury accepted Andrade's assault defense? Only if the jury accepted Andrade's assault defense would the issue arise whether Andrade was guilty of a crime less serious than that committed by Delacruz.

We conclude that it is not reasonably probable that the jury accepted Andrade's assault defense.

The text communications between Andrade and Delacruz took place over eight days. Andrade wrote to Delacruz: "everything's ready." Delacruz wrote to Andrade: "alright then--I'll kill him myself--wait a while more--today it will not happen." Andrade wrote to Delacruz: "you know I think that I gave him too many pills." Delacruz replied: "give him a lot--that way I'll fuck that idiot for you." The two then exchanged the following (beginning with Andrade): "he's throwing up--so that he'll be weak"; "I'm on my way over there with the Paste's (pills). Is he asleep now--do you have rope"; "I don't have rope--it's open--where are you. Come now I'm waiting for you--he has his arms around me--it's open"; "I thought you said he was asleep, my associate 'EL Mernmero' "; "He almost found the cell--did you bring the pills--throw them in the car--it has to be today without fail. If he finds out that the gun is not here what shall I do. Buy the rope and I'll wait for you here during the night--don't leave or tell me you're her[e] so we can meet at McDonald's. Don't leave, please today it has to end." Andrade wrote to Delacruz: "I gave him the pills--it's open--enter where your at [*sic*] my love. I'll wait for you here--bring the rope. What happened--where are you. If your not going to do it, come and bring me the gun before he finds out." Delacruz wrote to Andrade: "Get me a

gun today." Andrade later wrote to Delacruz: "Is it alright in the truck, it is the one that is in the garage--and who are you going to bring with you my love so that they can drive. Try to obtain the chloroform. . . . Don't do anything in the house. They have to be sure that he is very dead. The rat--if its possible have them chop his head off, that way it can be sure that he is dead and does not come back to life. . . . Do you want me to put drops in his coffee--tell me [now]--I'm about to do it." Andrade wrote to Delacruz: "If you get here quick--come and leave the pills--or come and get in the house, it is going to be open." Andrade wrote to Delacruz: "Love, when you get here, come in. It is going to be open. Bring shoes that will not make any noise and the other person as well. Go into the same room. Bring everything. I going [*sic*] to have . . . so that it will not be heard when when you come in. I leave it in the same spot, the planter underneath the pillow." At 1:36 a.m. on the day of the murder, Delacruz wrote to Andrade: "I have the pills. Go to the usual gas station." Andrade replied: "Don't call the house, come here, I can't get out. The TV is on loud so that you can come in." Delacruz answered: "So what's going on with you. This is the last opportunity." Andrade replied: "He is not here at the house. I already picked up the pills. I'm going to give them to him here, but it's open."

Delacruz murdered Zarate later in the morning and telephoned Andrade with the news.

Andrade lied to Detective Martinez during her first interview with him: she told him that she had last seen Zarate on the day of the murder and that he had left for Salinas. Andrade lied to Detective Martinez during a subsequent telephone conversation with him: she told him that she had no knowledge of how or why Zarate was killed. Andrade lied to Detective Martinez during her third interview with him: she told him that she always devoted herself to Zarate. Only after Detective Martinez exposed the damning text conversations did Andrade, for the first time, say "I didn't want them to kill him." In addition, Andrade told witness Consuelo Gomez, who had seen her and Delacruz

together, to refuse to talk to the police except to say that Zarate had left his home at 11:00 a.m. on the morning of the murder.

This remarkable evidence, much of it from Andrade herself, paints a crystal clear picture of a woman in league with her lover plotting to kill and killing her husband with her husband's own gun. Andrade told Delacruz that she wanted "the rat" dead and drugged Zarate before delivering him into the killer's hands. That Andrade tried to cover up her complicity with lies, rather than come clean by immediately reporting to the police an assault gone awry, corroborates her murderous intent. There is no reasonable probability that the jury believed Andrade's assault defense but was compelled to convict of first degree murder because it had no instructional roadmap to a second degree murder or manslaughter conviction. No rational jury, properly instructed on the natural and probable consequences doctrine, could have credited Andrade's self-serving assault theory and followed the instruction to convict Andrade of a crime less serious than Delacruz's conviction. " 'It would, indeed, require fantastic speculation on our part to hold that a reasonable jury could have found otherwise.' [Citation.] Under these circumstances, requiring that the judgment be reversed on this ground would constitute a miscarriage of justice. We believe that this is a classic example of the type of situation in which California Constitution, article VI, section 13, was intended to apply and to bar a court from reversing a judgment." (*People v. Flood* (1998) 18 Cal.4th 470, 491.) We find the instructional error harmless. And for the same reasons, we find that trial counsel's supposed deficiency in failing to request CALCRIM No. 402 (given that the trial court gave the bracketed portion of CALCRIM No. 400) does not undermine our confidence in the outcome of this case. (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

In a variation of this theme, Andrade contends that the error is reversible per se under the state-interference-with-a-defense theory implicit in the Sixth Amendment to the United States Constitution. (*Ross v. Moffitt* (1974) 417 U.S. 600.) According to

Andrade, the trial court's partial instruction on the natural and probable consequence doctrine fundamentally undermined the theory of her defense and the ability of her counsel to respond to the People's case. She reasons that "the court's injection of the natural and probable consequence doctrine without full instructions left the jury able to accept the defense, yet still convict of murder, thereby undermining the entire defense without any notice to counsel at all."

We disagree that the trial court deprived Andrade of "an adequate opportunity to present [her] claims fairly within the adversary system." (*Ross v. Moffitt*, *supra*, 417 U.S. at p. 612.) Andrade's defense was that she intended an assault. She argued to the jury that she intended an assault. The trial court instructed the jury to acquit if it accepted that Andrade had no intent to kill. Had the trial court properly instructed on the natural and probable consequences doctrine, Andrade's defense would have been no different--she intended an assault.

DISPOSITION

The judgment against Delacruz is affirmed. The judgment against Andrade is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.